No. 86-906

Supreme Court, U.S.
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In The Supreme Court of the United States

October Term, 1986

CYRUS YONAN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED

Whether the language and legislative design of the RICO statute permit section 1962(c) to be applied to a private attorney who is allegedly "associated with" the office of a county prosecutor, as required by section 1962(c), by virtue of the attorney's contacts with an assistant prosecutor in the course of litigation?

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In the

Supreme Court of the United States

Cyrus Yonan,

Petitioner,

vs.

United States of America,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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Prayer

Petitioner Cyrus Yonan respectfully requests that a Writ of Certiorari issue to review the judgment and order of the United States Court of Appeals for the Seventh Circuit.

Opinions Below

The Opinion and Order of the United States District Court for the Northern District of Illinois, reported at 623 F. Supp. 881, appears in Appendix A. The Judgment of the United States Court of Appeals for the Seventh Circuit affirming in part and reversing in part the judgment of the United States District Court for the Northern District of Illinois appears in Appendix B. The Opinion of the United States Court of Appeals for the Seventh Circuit, reported at 800 F.2d 164, delivered upon the rendering of its judgment, appears in Appendix C. The Order of the United States Court of Appeals for the Seventh Circuit denying a Petition for Rehearing with Suggestion for Rehearing En Banc appears in Appendix D.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The Petition for Rehearing with Suggestion for Rehearing En Banc was denied October 1, 1986. This Petition is filed within 60 days of that order.

Statute Involved

Section 1962(c) of Title 18 of the United States Code reads:

> It shall be unlawful for any person employed by or associated with any enterprise in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

Racketeer Influenced and Corrupt Organizations Act, Pub. L. No. 91-452, tit. IX, § 901(a), 84 Stat. 942 (1970) (hereinafter cited as "Section 1962(c)").

Statement of the Case

Petitioner is a criminal defense attorney in the City of Chicago. The original indictment and each of the four superceding indictments brought in this case alleged that the Petitioner on seven occasions gave money, totaling $750, to Mr. Terrence Hake over a two month period. The money was allegedly given in connection with Mr. Hake's duties as an Assistant State's Attorney in Branch 57, a preliminary hearing court of the Circuit Court of Cook County. At the time, Hake was working undercover with the Federal Bureau of Investigation. Count One of the fourth superceding indictment, which is at issue here, charged a violation of section 1962(c) by alleging that the Petitioner was "an attorney and a member of the bar of the State of Illinois" and that the "Office of the Cook County State's Attorney" was

an enterprise within the meaning of 18 U.S.C § 1961(4). App. at 2e.* Count One further charged that the State's Attorney's Office "represented the People of the State of Illinois in matters arising in Branch 57" and that "Terrence Hake was an Assistant State's Attorney assigned to Branch 57." App. at 3e. Count One went on to charge that Petitioner "being a person associated with" the alleged enterprise, participated in the affairs of that enterprise through a pattern of racketeering consisting of the alleged payment of bribes to Hake, in violation of the state bribery statute, Ill. Rev. Stat. ch. 38, ¶ 33-1. App. at 5e. Count Two of the fourth superceding indictment, an identical version of which had been previously dismissed by the

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*Count One of the fourth superceding indictment is set out in Appendix E.

District Court in an opinion published at 621 F. Supp. 721, charged a violation of section 1962(a).

On December 2, 1985, the District Court dismissed Count One and Count Two of the fourth superceding indictment for failure to allege federal offenses. The District Court dismissed Count One of the fourth superceding indictment, holding that it did not state an offense under section 1962(c) because it did not contain any factual allegations to support the conclusory charge that the Petitioner was "associated with" the alleged enterprise of the State's Attorney's Office. Reasoning that the language of section 1962(c) demonstrated that the element of association with the enterprise and the element of conducting or participating in the affairs of the enterprise were conceptually distinct, the District Court held that the element

of association was not satisfied by allegations that the Petitioner indirectly participated in the affairs of the Cook County State's Attorney's Office through a pattern of racketeering activity consisting of bribery. App. at 7a-8a. Reading the language of section 1962(c) to require an association with the enterprise itself, the District Court held that, in the absence of employment or a contractual relationship, a defendant is "associated with" an enterprise only if the defendant's participation in the affairs of that enterprise is consistent with the purposes or goals of the enterprise. App. at 14a. Accordingly, Count One was deficient because the Petitioner, as a criminal defense attorney, did not share the prosecutorial goals of the enterprise of the prosecutor's office. Furthermore, the Petitioner did not share the goals or

interests of the alleged enterprise by his alleged relationship with the assistant prosecutor through the pattern of racketeering activity, since those acts were contrary to the goals or purposes of the State's Attorney's Office, as defined by those with the responsibility to do so. App. at 16a-17a. The District Court dismissed Count Two for "the same reasons discussed" in its earlier opinion. App. at 3a.*

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*Count Two of the fourth superceding indictment, like another count in an earlier indictment, alleged that the Petitioner's law practice, which was a sole proprietorship, was an enterprise, and that he was a person "employed by or associated with" that enterprise. In an opinion published at 622 F.Supp. at 721, the District Court dismissed that count, holding that the allegations, if accepted as true, would not establish that the Petitioner was distinct from the alleged enterprise, as required by Haroco v. American National Bank & Trust Co., 747 F.2d 384, 402 (7th Cir. 1984), aff'd on other grounds, 105 S.Ct. 3291 (1985).

As an alternative ground for dismissal, the District Court held that

(Footnote continued.)

Pursuant to 18 U.S.C. § 3731, the government appealed the District Court's order of December 2, 1985. In its opinion, the Seventh Circuit affirmed the District Court's dismissal of Count Two of the fourth superceding indictment "as an appropriate application of res judicata." App. at 10c. Review of that portion of the Seventh Circuit's holding is not sought by this Petition.

The Court of Appeals reversed the District Court's dismissal of Count One of the fourth superceding indictment, holding that the count contained adequate factual allegations that the Petitioner

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(Continued from preceding page.) under Bouie v. City of Columbia, 378 U.S. 347 (1964), retrospective effect could not be given to the interpretation placed upon section 1962(c) by McCullough v. Suter, 757 F.2d 142 (7th Cir. 1985), which held that under some circumstances a sole proprietorship could be sufficiently distinct from the sole proprietor to permit application of section 1962(c).

was "associated with" the alleged enterprise, the Cook County State's Attorney's Office. The Court of Appeals held that section 1962(c) did not require that the defendant's relationship with the enterprise be consistent with the goals or purposes of the enterprise in order to be "associated with" the alleged enterprise. App. at 14c. Instead, the Court of Appeals ruled that the association element is satisfied if the defendant has a "business relationship" with the alleged enterprise. App. at 14c. According to the Court of Appeals, Count One alleged that the Petitioner had such a business relationship with the alleged enterprise, the Office of the Cook County State's Attorney, because the "relevant business of the Cook County State's Attorney's Office is to prosecute and otherwise dispose of criminal cases; [the Petitioner's] business as an attorney was

to negotiate with, oppose, or otherwise deal with that office in representing criminal defendants." App at 18c. Petitioner seeks review of that portion of the Seventh Circuit's holding which reversed the judgment of the District Court.

Reasons For Granting the Writ

The limitations of the RICO statute are to be found in the language of the statute. In Sedima, S.P.R.L. v. Imrex Co., 105 S.Ct. 3275 (1985), this Court proposed, in strongly worded obiter dictum, that part of the remedy for RICO's overexpansion was to develop a meaningful definition of the "pattern" element. Id. at 3287. Although this Court was not unmindful in Sedima of the fact that RICO was being applied to instances never intended by Congress, this Court rejected certain judicially

imposed limitations upon the RICO statute because those limitations were not contained in the language of the statute. Underlying the decision in Sedima was the concern that the creation of limitations by the judiciary was beyond the proper scope of judicial power. This case presents an opportunity to demonstrate that RICO's harsh criminal and civil provisions can be limited in a manner consistent with the appropriate exercise of judicial power.

This Court should grant its Writ in order to consider how the "employed by or associated with" language of the statute can be meaningfully defined. The Court of Appeals' decision reveals that the lower courts need guidance on the proper method of resolving fundamental questions concerning RICO's scope. The Court of Appeals' holding that a private attorney could be "associated with" the office of

a county prosecutor by virtue of the attorney's contacts with an assistant prosecutor in the course of litigation is contrary to the language of the statute, will create a dangerous expansion of RICO's harsh criminal and civil sanctions. Further, this Court should issue its Writ in order to make clear that the holding in Sedima does not prevent lower courts from limiting RICO's scope if the limitation is firmly grounded in the language which Congress enacted.

1. The Court of Appeals' holding is contrary to the plain language of section 1962(c) which requires that the defendant's relationship with the enterprise be an association, not merely a series of contacts, and that the association be with the alleged enterprise, and not merely with an employee of that enterprise.

Whether used as a verb or a noun, the core meaning of "associate" is to combine or join together for a common purpose or over a common interest. See, e.g., Webster's Third New International Dictionary 132 (1971) (an associate is "one who shares with another an enterprise, business, or action). Thus persons who do business together are said to be "business associates"; a senior partner has his "associates" do research for petitions like this one. As these two examples suggest, "associate" connotes a voluntary relationship of some duration with some financial dimension. See United States v. Bledsoe, 674 F.2d 647, 663 (8th Cir. 1982)(conjunctive pairing of employment relationship with the association relationship in section 1962(c) indicates that Congress intended it to be applied only to persons who were actually employed by the enterprise or

whose relationship with the alleged enterprise shared some of the significant characteristics of employment), cert. denied, 459 U.S. 1040 (1983).

The Court of Appeals' holding conflicts with the language of section 1962(c) because an attorney's relationship with his opponent in the course of litigation shares none of the characteristics of association suggested by the plain meaning of the word. Lawyers engaged in litigation are competitors. Lawyers in litigation do not share any common purpose, but rather look out for the interests of their clients. Lawyers in litigation do not choose whom they oppose and any economic benefit they might receive comes from the client, not from the opposing attorney's law firm. Like all lawyers involved in litigation, the Petitioner and an assistant prosecutor may have talked to each other,

negotiated on behalf of their clients, and opposed each other in court. But in these contacts, the Petitioner shared no common purpose with the assistant prosecutor or his office. The Court of Appeals' application of section 1962(c) to a person who is "associated with a person employed by any enterprise" is simply contrary to the statute's language. Here, the alleged litigation contacts between the Petitioner and an assistant prosecutor could not establish an association with the enterprise, but rather only with an employee of the alleged enterprise. App. at 21a n.10.

The Court of Appeals turns away from common sense and the language of section 1962(c) by holding that a private attorney is "associated with" the office of a county prosecutor by virtue of the attorney's contacts, however few, which occurred during the course of litigation

with an assistant prosecutor assigned to a preliminary hearing courtroom.

2. The Court of Appeals' holding significantly expands the scope of RICO's harsh civil and criminal provisions to situations, like the instant case, where none of RICO's remedial purposes can be achieved.

As a result of the holding of the Court of Appeals, every attorney is associated, for the punitive purposes of RICO, with the firm of each opponent the attorney faces in litigation. But the flood of RICO liability turned loose by the Court of Appeals will not stop at the legal profession. Under the Court of Appeals' holding, any two business competitors, no matter how large or how very, very small, are associated with each other by virtue of the "contacts" which are a natural part of that

competition. Any small business owned and operated by a single person which has a large corporate competitor will now be "associated with" that corporate competitor and liable under RICO for the smallest of frauds. Even members of the Attorney General's Office would be "associated with" the enterprise-partnership which represents the Petitioner. Although we cannot imagine the lawyers of that office engaging the members of this firm in a pattern of racketeering activity, we do not think that such conduct by an Assistant Attorney General would pose the kind of threat to the partnership-enterprise which Congress intended to eliminate when it enacted RICO.

One of RICO's purposes was to proscribe the infiltration or control of legitimate "enterprises" through criminal conduct specified in 18 U.S.C. § 1961(1).

United States v. Turkette, 452 U.S. 576, 588-89 (1981). See also App. at 11a-12a. However, the threat of illicit control of an enterprise does not exist where, as here, the putative RICO defendant has only an attenuated relationship with the enterprise. It defies common sense to suggest that the Petitioner posed any threat to the alleged enterprise--a county prosecutor's office in the third largest city in the country--as a result of the allegations that the Petitioner paid a few bribes over only a two month period to an assistant prosecutor assigned to a preliminary hearing courtroom.

If "contacts" between lawyers during the course of litigation are sufficient to establish the association required by section 1962(c), then RICO will be increasingly applied to many cases like this one where none of RICO's purposes

can be furthered. Yet Congress never intended RICO to be "'aimed at the isolated offender.'" Sedima, 105 S.Ct. at 3285 n.14 (quoting 116 Cong. Rec. 35, 193 (1970)(statement of Rep. Poff). Nor did Congress ever intend RICO's severe civil and criminal penalties to be applied to the "mere commission of the predicate offenses." Id. at 3285. Because "Congress opted for a "[broad] definition of the word 'enterprise'," United States v. Turkette, 452 U.S. at 593, the Court of Appeals' rejection of any meaningful definition of the association element ensures that this case will be only the first of many in which overzealous prosecutors and plaintiffs' attorneys will use the Court of Appeals' holding to apply RICO's harsh civil and criminal penalties even though none of RICO's purposes can be achieved.

3. The Court of Appeals' holding conflicts with Congress's intent to limit RICO's applicability to instances where each element of the offense was present.

The Court of Appeals' holding dangerously expands the scope of RICO's severe civil and criminal penalties to situations which Congress never intended. This expansion results because the court reads out of section 1962(c) the very limiting language which Congress incorporated. Congress deliberately included each element of the RICO violation in order to limit its scope to situations in which RICO's purposes could most likely be achieved.

Despite the importance of RICO's purposes, farsighted opponents to the bill were concerned that RICO would be applied where none of its aims could be achieved. "A court need not infer from such statements by opponents that

Congress intended those consequences to occur, particularly where, as here, there is compelling evidence to the contrary." Sedima, 105 S.Ct. at 3288 (Powell, J., dissenting). The fears of RICO's opponents did not go unheeded. The legislative history reveals that the solution to the dilemma was to include in the RICO statute certain limiting elements which, although they did not mention "organized crime," would narrow RICO's focus to situations where its purposes could be furthered. "[E]ach element of the crime . . . was designed to limit the applicability of the statute and separate individuals engaged in organized crime from ordinary criminals." United States v. Bledsoe, 674 F.2d at 663.

This Court suggested just such an approach in United States v. Turkette, 452 U.S. 576, and in Sedima S.P.R.L. v.

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Imrex Co., 105 S.Ct. 3275. It was the "enterprise" element of RICO which was the subject of this Court's scrutiny in Turkette. The appellate court in Turkette had reasoned that if a criminal organization could be an "enterprise," then an offense under section 1962(c) would be proved if the government merely proved a defendant's participation in a pattern of racketeering activity. Rather than torture the language of the statute to equate the "enterprise" element with a defendant's participation in a pattern of racketeering, this Court answered the concern of overexpansion by focusing on the distinct nature of each element of the offense. "While the proof used to establish these separate elements may in particular cases coalesce, proof of one does not necessarily establish the other." Id. at 583.

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In Sedima, this Court utilized the same approach to analyze the "pattern" element. Emphasizing that Congress did not intend RICO to be applied to the mere commission of the predicate acts, this Court held that "[t]hose acts are, when committed in the circumstances delineated in § 1962, 'an activity which RICO was designed to deter.'" 105 S.Ct. at 3286 (emphasis added)(quoting Sedima, S.P.R.L. v. Imrex Co., 741 F.2d 482, 496 (2d Cir. 1984)). To remedy at least in part future unwarranted expansions of RICO, this Court instructed the lower courts to develop a meaningful definition of the "pattern" element. Id. at 3287.

Under this Court's reasoning in Turkette and Sedima, the development of a meaningful definition of the "associated with" element is equally as important as the development of meaningful definitions of the "pattern" and "enterprise"

elements. Indeed, the development of a meaningful definition of "associated with" which would distinguish that element from the other elements of the RICO offense is mandated by this Court's reasoning in Sedima and Turkette.

It was the District Court's adoption of this approach which led to the dismissal of Count One. Following this Court's analysis, the court first noted the distinctiveness of the "association" element and held that an indictment charging a violation of section 1962(c) must allege some fact of association distinct from the defendant's alleged participation in the affairs of the enterprise through the alleged pattern of racketeering activity. App. at 7a-8a. The District Court then proceeded to meaningfully define the "association" element. Surveying the case law, the District Court found two characteristics

shared by each instance in which section 1962(c) was applied to an "associate" of an enterprise:

> 1. All had a relationship with the enterprise characterized by a stake or interest in the goals of the enterprise --legitimate or illegitimate.
>
> 2. All were associated with the enterprise as such, not merely with some other individual who was "employed by or associated with" the enterprise but was off on a frolic and detour of his or her own.

App. at 14a.*

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*The District Court's reasoning is analogous to this Court's holding that a policy-maker's single action can be an act of a municipality for the purposes of 42 U.S.C § 1983, while the single act of a lower-level employee cannot. Pembaur v. City of Cincinnati, 106 S.Ct. 1292 (1986).

The District Court's holding adheres to the language of section 1962(c) which requires an association with the enterprise itself and not merely with a person who was employed by the enterprise. In addition, only by adopting the District Court's reasoning can the "association" element be given a meaningful definition rather than merely equating that element with another element of the offense. Accordingly, the District Court's approach is consistent with the approach suggested by the legislative history and this Court's decisions in Sedima and Turkette. Finally, the meaningful interpretation of the "associated with" language furthers RICO's purpose of preventing the control of an enterprise through specified conduct, while at the same time limiting its application to instances where the threat of illicit control is

truly present. Since the allegations of Count One would not establish that the Petitioner was "associated with" the alleged enterprise, the District Court properly dismissed that Count.

In rejecting the District Court's holding, the Court of Appeals failed to follow the analysis which this Court employed in Sedima and in Turkette. The Court of Appeals declined to distinguish the "association" element from the other elements of the offense. Because of the Court of Appeals' failure to distinguish the elements of the RICO offense, the court was unable to give the "association" element any meaningful definition. The failure of the Court of Appeals to follow this Court's reasoning has resulted in the very evils which this Court intended to avoid; the Court of Appeals has created RICO exposure, both criminal and civil, in many cases where

none of RICO's purposes can be achieved. Such an unwarranted expansion of RICO cannot be allowed to stand.

Conclusion

In Sedima, this Court urged the lower courts to resolve issues concerning RICO's scope by relying upon the language of the statute itself. This Petition presents this Court with an opportunity to employ the approach recommended in Sedima. This Court should grant its Writ in order consider whether a private attorney can be "associated with" the Office of a County Prosecutor as required under 18 U.S.C. § 1962(c) by virtue of the attorney's contacts with an assistant prosecutor in the course of litigation.

Respectfully Submitted,

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APPENDIX A

UNITED STATES OF AMERICA, Plaintiff,

v.

CYRUS YONAN, JR., Defendant.

No. 84 CR 246.

United States District Court
N.D. Illinois, E.D.

Dec. 2, 1985.

MEMORANDUM OPINION
AND ORDER

SHADUR, District Judge.

On November 27, 1985 the United States Attorney obtained from the grand jury its fifth essay -- the fourth superseding indictment (simply the "Indictment," except where it is necessary to distinguish the current version from prior versions) -- at leveling multiple charges against Cyrus Yonan, Jr. ("Yonan"). This latest return to the drawing board was directed at correcting obvious drafting errors in the third

superseding indictment,[1] which had itself made one important substantive change from the second superseding indictment, the version dealt with in this Court's November 15, 1985 memorandum opinion and order (the "Opinion").

[1] As the Opinion at 15 reflects, Counts Three through Ten in the second superseding indictment were mail fraud charges. All except the first of those counts followed the customary drafting form of incorporating by reference (rather than repeating in haec verba) the general allegations of Count Three. Because the third superseding indictment then shoehorned in a new Count One (the same as the current Count One, of which more later), the unchanged mail fraud charges were moved up in the numbering -- they became Counts Four through Eleven. Yet through a drafting oversight the last seven of those counts continued to incorporate by reference "Count Three" (even though that had become a RICO charge in the third superseding indictment, whereas it had earlier been a mail fraud charge), rather than properly changing that reference to "Count Four" to conform to the renumbering in the third superseding indictment. That mistake was corrected in the Indictment, which also took the occasion to cure an omission that was identified in the Opinion at 26 n.12 but was nevertheless perpetuated in the third superseding indictment.

For the same reasons discussed in the Opinion at 2-10, Indictment Count Two (identical to Count One of the second superseding indictment) is dismissed. Indictment Count Three (identical to Count Two of the second superseding indictment) survives under the analysis in the Opinion at 11-15. Mail fraud Indictment Counts Four through Eleven also stand, for the reasons stated in the Opinion at 15-28 in dealing with corresponding Counts Three through Ten of the second superseding indictment.

That leaves for fresh consideration only Indictment Count One, which reflects a wholly new theory[2] for Yonan's conviction under 18 U.S.C. §1962(c), one

[2] Both Judge Thomas McMillen (to whose calendar this case was originally assigned) and this Court have entered orders properly excluding time for purposes of the Speedy Trial Act, 18 U.S.C. §§3161-3174, and those orders prevent this case from coming even

of the provisions of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§1961-1968.[3] According to new Count One ¶3(b), the RICO "enterprise" (see Section 1961(4)) was the Office of the Cook County State's Attorney (the "State's Attorney's Office"). Count One ¶5 charges Yonan with the same acts of bribery referred

(footnote continued)
close to posing a time problem under the statute. All the same, there is something disquieting about such continuing and repeated efforts by the prosecutor to restate criminal charges based on the identical conduct that was addressed by the United States Attorney and the grand jury from the very beginning of this case. Both a defendant and the public have a right to expect criminal charges to proceed to trial promptly. And though that is universally true, it may be even more so in high-profile cases (Yonan's 1984 indictment grew out of the original Greylord investigation). In any event, this Court expects to push the case to an early trial.

[3] All further RICO citations will take the form "Section ___," with the numbering drawn from Title 18 rather than RICO's internal numbering.

to in the Opinion at 14, all involving payments and offers of payment to Terrence Hake ("Hake") -- an Assistant State's Attorney whom Yonan believed to be corrupt but who turned out to be an undercover agent -- to fix criminal cases involving Yonan's clients. As Count One ¶3(c) would have it, that renders Yonan "associated with" the State's Attorney's Office enterprise -- a necessary ingredient of any charge under Section 1962(c).

It is by now familiar lore that proper pleading of a Section 1962(c) charge requires the allegation that a "person" conducted or participated in the affairs of an "enterprise," each of the quotation-marked terms being an entity distinct from the other. Haroco, Inc. v. American National Bank & Trust Co., 747 F.2d 384, 400-02 (7th Cir.

1984) (citing with approval this Court's decision in Parnes v. Heinold Commodities, Inc., 548 F.Supp. 20, 23-24 (N.D.Ill. 1982)), aff'd per curiam, ___ U.S. ___, 105 S.Ct. 3291, 85 L.Ed.2d 437 (1985). Further, Section 1962(c) in terms attaches criminal responsibility only to a person "employed by or associated with" an enterprise.

Yonan (the "person") was obviously not "employed by" the State's Attorney's Office (the charged "enterprise"). Thus he must perforce have been "associated with" that office if Count One is to stand. Unfortunately, RICO's definitional Section 1961 does not prescribe the content of "associated with," nor is the legislative history very helpful. But a few basic propositions will serve to put Yonan's situation in proper perspective.

RICO's very sentence structure and normal use of the English language demonstrate that "associated with" is a concept wholly distinct from "conduct[ing] or participat[ing], directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity."[4] In that respect United States v. Forsythe, 560 F.2d 1127, 1136 (3d Cir. 1977), on which the government relies in part, simply

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[4] Had Congress meant simply to equate the terms "employed by or associated with" with an offender's conduct or participation in the conduct of the enterprise's affairs, the quoted language could have been omitted entirely. Section 1962(c) could have made it unlawful for "any person to conduct or participate ... in the conduct of [an] enterprise's affairs through a pattern of racketeering activity." To give any content to the "employed by or associated with" language, it must be given the status-defining meaning next expressed in the text, while the "conduct or participate" clause defines what the defendant must do to or with the enterprise.

misreads the statute. In RICO terms the phrase "associated with," like "employed by," defines a status relationship between the person and the enterprise. Acts of "racketeering" by the "person," though the rest of Section 1962(c) says they must have an effect on the conduct of the enterprise's affairs, do not themselves provide the status nexus between the racketeer and the enterprise. United States v. Bledsoe, 674 F.2d 647, 663 (8th Cir. 1982). Were it otherwise, robbing a bank twice would cause the robber to be "associated with" the bank. Just as the enterprise itself must amount to more than a sheer pattern of racketeering activity, United States v. Turkette, 452 U.S. 576, 583, 101 S. Ct. 2524, 2528, 69 L.Ed.2d 246 (1981) ("enterprise" is "proved by evidence of an ongoing organization, formal or informal, and by evidence that the various

associates function as a continuing unit"), one does not "associate with" an enterprise by committing crimes against it.

In part, Congress' use of the term "assocated with" (and not simply the term "employed by") shows an intention to permit criminal charges against persons outside the organizational structure of an enterprise as well as within it.[5] United States v. Elliott, 571 F.2d 880, 903 (5th Cir.), cert. denied, 439 U.S. 953, 99 S.Ct. 349, 58 L.Ed.2d 344 (1978); United States v. Bright, 630

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5 One other obvious purpose stems from Section 1961(4)'s sweeping definition of "enterprise" to embrace not only conventional legal entities but also such less structured concepts as an association of persons. If Section 1962(c) had spoken only of persons "employed by" the enterprise, the anomalous result could have been that employees of such an association could be indicted, while the principals -- the associates themselves -- might not.

F.2d 804, 830 (5th Cir. 1980) (citing Elliott); United States v. Lee Stoller Enterprises, 652 F.2d 1313, 1320-21 (7th Cir. 1980) (en banc) (citing Bright), cert. denied, 454 U.S. 1082, 102 S.Ct. 636, 70 L.Ed.2d 615 (1981). But that does not answer what quality of "association" is required to permit the outside person to be swept into the criminal net.

RICO, it should be remembered, is directed against the acquisition and conduct of "enterprises" through specified types of criminal behavior by persons directly linked to those enterprises. Sections 1962(a) and (b) address the acquisition of interests in, and the maintenance of, enterprises through racketeering (Section 1962(b)) or through funds obtained from racketeering (Section 1962(a)). Section

1962(c) addresses the conduct of enterprises through racketeering activity by specified categories of persons.[6] Thus a

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[6] See 116 Cong.Rec. 602 (1970) (emphasis added) (remarks of Sen. Hruska, co-sponsor of the bill):

> Stated simply, this legislation makes it unlawful for any person to acquire an interest in or establish an enterprise engaged in interstate commerce by the use of income derived from "a pattern of racketeering activity" .... It would also prohibit any person from acquiring or maintaining any interest or control of any such enterprise by a pattern of racketeering activity, and likewise prohibit any person employed by or associated with such an enterprise from conducting the enterprise's affairs by a pattern of racketeering activity.

See also id. at 607 (remarks of Sen. Byrd) (RICO makes it unlawful "to acquire or operate such businesses by racketeering methods"); id. at 35,193 (remarks of Cong. Poff) (similar); id. at 35,197 (remarks of Cong. Railsback (similar). House Judiciary Committee Chairman Celler expressed a somewhat narrower view of what RICO was about id. at 35,196) (emphasis added):

> [RICO] proscribes the acquisition, maintenance or control of any interest in a business engaged in commerce through a pattern of racketeering activity.... The conduct of the affairs of a business

prime instance of the sort of non-employee target Congress aimed at through RICO is the control of a corporate enterprise's activities by a majority shareholder -- a "person" who is not necessarily an employee but who is clearly "associated with" the enterprise.[7]

Subcontractors, accountants, lawyers and consultants all may be

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(footnote continued)
by a person acting in a managerial capacity, through racketeering activity[,] is also proscribed. Thus in Congressman Celler's view a Section 1962(c) "person" would have to be someone more than a mere employee, despite the simply "employed by" language of Section 1962(c). This Court is not prepared to embrace that restriction (see, e.g., Parnes, 548 F.Supp. at 23-24), but that issue need not be faced for current purposes (see also n. 10).

7 That example illustrates the utility of "associated with" in the more conventional legal-entity type of "enterprise" (such as a corporation) as well as the more amorphous "enterprise" (see n. 5).

"associated with" an enterprise, see Schacht v. Brown, 711 F.2d 1343, 1360 (7th Cir.), cert. denied, 464 U.S. 1002, 104 S.Ct. 508, 78 L.Ed.2d 698 (1983) though they are not its employees.8 And as n. 5 illustrates, if the enterprise is simply what Section 1961(4) calls "any union or group of individuals associated in fact, although not a legal entity," logic as well as normal language usage tells us each of those individuals is ordinarily "associated with" the enterprise (whether or not its employee). Membership in a union or a club is an example, as well as member-

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8 Of course many such persons may also be said to be "employed by" an enterprise in common speech (if not perhaps in technical parlance). See Forsythe, 560 F.2d at 1136 (constables and magistrates who regularly solicited and received bribes from a bail bond agency might be viewed as "employees" of that agency, for in essence they were on its payroll).

ship in a criminal organization of the sort described in Turkette.

Whether inside or outside the enterprise's organizational structure, all of the "associates" given above as examples share two characteristics:

1. All have a relationship with the enterprise characterized by a stake or interest in the goals of the enterprise -- legitimate or illegitimate.

2. All are associated with the enterprise as such, not merely with some other individual who is "employed by or associated with" the enterprise but is off on a frolic and detour of his or her own.

Both of those characteristics are in a sense tautological. But that is due in large part to their obviousness. And given the government's myopia on this score, it is necessary to state them in

that form to show exactly why Yonan's connections with Hake did not associate Yonan with the State's Attorney's Office.

There is a sharp distinction between the Yonan-Hake association and the situations that have been held to present "associated with" relationships in the cases the government has cited. In Bright, for example, Bright operated a bail bond agency involved in bribing the county sheriff. Bright was held a person "associated with" the enterprise of the County Sheriff's Office, 630 F.2d at 830. In like fashion, the sheriff's bagman and payoff collectors in his corrupt scheme were held "associated with" the enterprise, id. at 831-34. Of course the goals of a county sheriff's office are not supposed to be corruption of justice. But the involvement of the head of the office -- the sheriff him-

self -- as bribetaker made his goals those of his own office qua "enterprise." Thus Bright shared the purpose of the charged enterprise, though Bright's own purpose (and that of the entrepreneur himself, the sheriff) was to subvert the goal the enterprise should have had. And because Bright and his co-defendants worked for the man who directed and set the policy of the enterprise, they were related to the enterprise as a whole, at the management level.

Yonan's case is critically different. Here the State's Attorney's Office itself is not alleged to have been corrupt or to have had a corrupt goal. Quite to the contrary, Yonan's goal was to undermine the Office's -- the enterprise's -- actual legitimate goals. Hake had (that is, pretended to have) a corrupt goal, but that was his

own goal and not his employer's. Nor was Hake a policy-maker of the State's Attorney's Office as "enterprise." His own (feigned) corruption is not alleged to have infected anyone else. So Yonan was not associated through Hake with anyone but Hake.

Forsythe and Lee Stoller Enterprises are analytically identical to Bright. In each case the goal of the enterprise identified in the indictment -- in Forsythe a bail bond agency and in Lee Stoller Enterprises a county sheriff's office -- was corrupt, though in a perfect world it would not have been. And in each case the defendant -- the person associated with the enterprise -- shared that goal. In each case the defendant dealt with management-level people at the enterprise, so it could be said the defendant dealt with the enterprise as a

whole, and not merely with a corrupt employee out to torpedo the enterprise's actual activities as set by its leader(s).

Finally, United States v. Starnes, 644 F.2d 673 (7th Cir. 1981), cert. denied, 454 U.S. 826, 102 S.Ct. 116, 70 L.Ed.2d 101 (1981), not cited by the parties, illustrates the same two principles in a context not involving official corruption. There Starnes, president of Tri-No Corporation, hired Roland to "torch" the building that housed Tri-No's operations. Our Court of Appeals focused its discussion principally on the question whether Roland, the arsonist, "participat[ed], directly or indirectly, in the conduct of the enterprise's affairs" by burning its headquarters, 644 F.2d at 679. But it is also clear (as it had to be for Roland's conviction) Roland was "associated with"

Tri-No Corporation. Though Tri-No had been a legitimate business, its president had determined it was better off in cinders. Thus Roland shared the twisted goal that had been set for the enterprise, rather than working against it. Toward that end he dealt with the enterprise's policy-maker directly -- with the enterprise as such, not (say) with a disgruntled shipping clerk whose purpose was revenge against Tri-No.

All the cases thus reflect the sense (and common sense) that must be ascribed to the "associated with" concept in Section 1962(c).[9] And that sense, and common sense, are flouted by Count One. Hake was himself only an

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[9] It is worth observing the reading of "associated with" reflected in this opinion conforms to all the legislative statements cited in n. 6, including the somewhat divergent expression by Congressman Celler.

employee of the State's Attorney's Office. Even had he been corrupt (as Yonan allegedly believed him to be), an association with him was not an association with the State's Attorney's Office -- the "enterprise."[10] It was an association against that enterprise.

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[10] As Section 1962(c) is drafted, the lack of an "associated with" relationship may screen out potential RICO defendants in a somewhat different way from the "employed by" situation. For example, Hake himself was employed by the State's Attorney's Office. Had he actually been corrupt, he could have been a "person" and the State's Attorney's Office the "enterprise," even though he were working against the policy of the office. For him to have been charged and convicted under RICO, the next elements of the crime would have had to come into play: Hake would have to conduct, or participate in the conduct of, the enterprise's affairs through a pattern of racketeering activity. See United States v. Grzywacz, 603 F.2d 682, 685-87 (7th Cir. 1979) (upholding, without discussing the "employed by or associated with" issue, the Section 1962(c) conviction of three corrupt policemen whose enterprise was the county police department), cert. denied, 446 U.S.

In sum, the government's latest attmpet to frame a Section 1962(c) indictment against Yonan is a failure. Now that pleaders have finally understood Section 1962(c) requires the allegation of an "enterprise" distinct from the "person"-defendant, it is time they focused more carefully on the statutorily required relationship between the person and the enterprise. Merely picking an enterprise out of a hat will not do.

(footnote continued)
935, 100 S.Ct. 2152, 64 L.Ed.2d 788 (1980). But the fact Hake (if actually crooked) might have been convicted for his connection with the enterprise alleged by the government does not at all mean anyone associated with him in his scheme would by extension be "associated with" his employer in Section 1962(c) terms. After all, Section 1962(c) speaks only of a "person employed by or associated with any enterprise," not of a "person associated with any person employed by any enterprise."

Conclusion

Counts One and Two of the Indictment are dismissed, but the other nine counts remain. Speedy trial concerns dictate an early decision by the government as to whether it is prepared to go to trial on those counts. Status for this case is next set for December 16, 1985 at 9:00 a.m., at which time the government will be required to advise this Court of its determination.

APPENDIX B

JUDGMENT - WITHOUT ORAL ARGUMENT

UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604

September 2, 1986

Before
HON. WALTER J. CUMMINGS, Chief Judge
HON. JOEL M. FLAUM, Circuit Judge
HON.FRANK H. EASTERBROOK, Circuit Judge

UNITED STATES OF AMERICA, Plaintiff-Appellant,	) Appeal from
	) the United
	) States District
No. 86-1005 vs.	) Court for the
	) Northern District
CYRUS YONAN,	) of Illinois,
Defendant-Appellee.	) Eastern Division,
	)
	) No. 84 CR 246
	) Milton I. Shadur,
	) Judge

This cause came before the Court for decision on the record from the United States district Court for the Northern District of Illinois, Eastern Division.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that

the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED IN PART and REVERSED IN PART, in accordance with the opinion of this Court filed this date.

APPENDIX C

In The
United States Court of Appeals
For the Seventh Circuit

No. 86-1005

UNITED STATES OF AMERICA,
Plaintiff-Appellant,
v.

CYRUS YONAN,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Divison.
No. 84 CR 246 - Milton I. Shadur, Judge

Argued May 30, 1986 - Decided September 2, 1986

Before CUMMINGS, Chief Judge, and FLAUM and EASTERBROOK, Circuit Judges.

FLAUM, Circuit Judge. This is an appeal by the United States brought pursuant to 18 U.S.C. §3731, from the district court's dismissal on December 2, 1985 of two counts of a multi-count indictment that charged attorney Cyrus Yonan with various offenses under the

RICO and mail fraud statutes, 18 U.S.C. §1962 et seq. and 18 U.S.C. §1341. The district court held that the two RICO counts failed to state a claim under the statute because (1) Yonan's sole proprietorship could not constitute the "enterprise" with which Yonan was "associated" for purposes of §1962(c); and (2) Yonan could not be "associated" with the Cook County State's Attorney's Office because he allegedly had committed crimes against that office. The government claims on appeal that the district court erroneously construed the legal requirements of the RICO statute and the cases interpreting that statute. We agree that the district court erred in dismissing the State's Attorney's Office count and we reverse that decision. The merits of the sole proprietorship count, however, are not before this court because the government failed

to appeal a previous dismissal of that count within the statutory thirty-day interlocutory appeals period, and the December 2 order appealed from merely dismissed the count on res judicata grounds. We affirm the district court's dismissal of that count as a proper application of res judicata principles.

I.

The government obtained an indictment against Yonan in March of 1984 as part of the "Operation Greylord" investigation of corruption in the Cook County court system. The original indictment contained a single RICO count charging Yonan with operating the affairs of his law practice through a pattern of racketeering by bribing Assistant State's Attorney Terrence Hake, an FBI "mole," in order to influence the disposition of some of Yonan's cases. A superseding

indictment then changed the enterprise charged from Yonan's law practice to "Cyrus Yonan, Jr." After a series of motions to dismiss, which alleged that an individual could not be both the enterprise and the defendant, the government on July 17, 1985, obtained yet another superseding indictment re-alleging the enterprise as "Cyrus Yonan, Jr.," but specifically charging that "the sole proprietorship of CYRUS YONAN, JR. employed a secretary and was an 'enterprise,' as defined in Title 18, United States Code, Section 1961(4)." This charge was added to conform the indictment with our recent opinion in McCullough v. Suter, 757 F.2d 142, 144 (7th Cir. 1985), which held that a sole proprietorship can constitute a RICO enterprise if it is "formally (as when there is incorporation) or practically

(as when there are other people besides the proprietor working in the organization) separable from the individual." The July 17 superseding indictment also added eight mail fraud counts.

Yonan made a motion to dismiss Count One (the RICO sole proprietorship count) of the superseding indictment, but this motion was overruled by Judge McMillen on August 1, 1985. Judge McMillen ruled that an individual could be employed by and associated with his sole proprietorship for RICO purposes, and that the question of whether Yonan's sole proprietorship was "practically separable" from him as an individual was one of proof, not one of the sufficiency of the indictment. The judge accordingly granted Yonan a bill of particulars requiring the government to detail its expected proof regarding how the sole proprietorship was an enterprise dis-

tinct from Yonan. Later that month, Judge McMillen retired from the bench, and Judge Shadur assumed responsibility over the case.

Yonan renewed his motion to dismiss the indictment and, during a status hearing on August 28, 1985, Judge Shadur requested that the parties address the retroactive applicability of the McCullough decision to Yonan's indictment. On November 15, 1985, in an opinion published at 622 F.Supp. 721 (N.D.Ill. 1985), Judge Shadur dismissed Count One on the grounds that a sole proprietor could not be employed by or associated with himself, and alternatively, that even if McCullough permitted such a construction of the statute, it would offend due process to apply that construction retroactively. The district judge overruled Yonan's

objections to the indictment's other counts.

Meanwhile, on November 13, 1985, the government obtained a third superseding indictment that contained the same counts as the existing indictment but added a new count charging Yonan with associating with the State's Attorney's Office and conducting the affairs of that office through a pattern of racketeering activity. This was superseded by a fourth superseding indictment on November 27, 1985 to correct typographical errors. During a hearing on December 2, 1985, Judge Shadur accepted Yonan's plea of not guilty to the new indictment and, in oral remarks, indicated that he was prepared to dismiss the State's Attorney's Office count because Yonan could not be said to have "associated" with the office. Instead, the district court suggested that since

Yonan was "plotting to subvert the operations of the enterprise," he could not be tied to the enterprise. When the government's attorney objected that the defendant had made no motion to dismiss the indictment, Yonan's attorney made an oral motion for the record. The district judge then dismissed the new RICO count for the reasons discussed above, and also re-dismissed the original RICO count, saying that he "had previously ruled on" that count and was dismissing it "for precisely the same reasons [he] stated in [his] earlier opinion." These oral rulings were memorialized in a written opinion published at 623 F.Supp. 881 (N.D. Ill. 1985). After the district court denied the government's motion to reconsider the dismissal of the State's Attorney's Office count, the government filed its notice of appeal on December 30, 1985.

II.

A. The Sole Proprietorship Count.

Yonan moved to dismiss the government's appeal of the sole proprietorship count on the grounds that the government failed to file a timely notice of appeal. We agree that the government failed properly to appeal the original dismissal of that count within the thirty-day period afforded by the statute, 18 U.S.C. §3731.[1] We disagree,

---

1 18 U.S.C. §3731 provides:

> In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information or granting a new trial after verdict or judgment, as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution.
> * * *
> The appeal in all such cases shall be taken within thirty days after the decision, judgment or order has been rendered and shall be diligently prosecuted.

however, with Yonan's assertion that this failure results in a lack of appellate jurisdiction. Since the government did appeal within thirty days of the December 2nd order, and since the December 2nd order contained a disposition of the sole proprietorship count, we have jurisdiction to review the district court's December 2 action dismissing that count. Nevertheless, that dismissal was merely an application of the doctrine of res judicata, since the district court previously had determined the identical issue between the parties. Therefore, we will not extend our review to examine the merits of the original November 15 decision, but affirm the ultimate dismissal as an appropriate exercise of res judicata principles. Were we to undertake a review of the merits, we would be allowing the gov-

ernment indefinitely to avoid the statutory thirty-day interlocutory appeals period simply by obtaining superseding indictments. In order to avoid this result, we hold in this case that res judicata bars the extension of the thirty-day period in which the government could appeal the dismissal of the sole proprietorship count. See United States v. Martinez, 681 F.2d 1248, 1252 (10th Cir. 1982) (subsequent denial of identical motion does not restart running of thirty-day period); United States v. Rothseiden, 680 F.2d 96, 98 (11th Cir. 1982) (same).

B. The State's Attorney's Office Count. In Count One of the fourth superseding indictment the government charged Yonan with violating 18 U.S.C.

§1962(c)[2] by associating with the Cook County State's Attorney's Office and conducting its affairs through a pattern of racketeering activity, that activity being seven acts of bribery involving an Assistant State's Attorney. The district court dismissed this count as legally insufficient because of its conviction that Yonan could not be said to have associated with the State's Attorney's Office. The district court identified two characteristics of persons who associate with enterprises for RICO purposes:

---

2 18 U.S.C. §1962(c) provides:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

1. All have a relationship with the enterprise characterized by a stake or interest in the goals of the enterprise -- legitimate or illegitimate.

2. All are associated with the enterprise as such, not merely with some other individual who is "employed by or associated with" the enterprise but is off on a frolic and detour of his or her own.

623 F.Supp. at 884-85. The district court concluded that Yonan shared neither of these characteristics, since he committed acts designed to undermine the office and thus had no interest in its goals, and since he had contact merely with a non-policymaker within the office who clearly was pursuing independent goals of his own.

Our review of the statute and the case law does not support either the

district court's view that these two characteristics are necessary or its conclusion that Yonan could not have been associated with the State's Attorney's Office. Section 1962(c) literally prohibits persons "employed by or associated with" an enterprise from illicitly conducting or participating in the conduct of the enterprise's affairs; the statute makes no mention of such persons needing a "stake or interest in the goals of the enterprise." Similarly, there is no statutory requirement that such persons have contact with policymakers or heads of enterprises before they can be said to be associated with it. In the absence of a statutory definition of "association," the cases have adopted a common sense reading of the term that focuses on the business of the enterprise and the relationship of

the defendant to that business. The cases make clear that the defendant need not have a stake in the enterprise's "goals," but can associate with the enterprise by conducting business with it, even if in doing so the defendant is subverting the enterprise's goals.

For example, in United States v. Lee Stoller Enterprises, 652 F.2d 1313, 1320-21 (7th Cir. 1981), the defendant Stoller was a fundraiser who agreed to organize promotional events in order to raise money for a deputy sheriffs' association. Reacting to pressure from deputies of the county sheriff's office, Stoller agreed to turn over to the county sheriff ten percent of the money he collected in exchange for the sheriff's protection. Stoller was convicted for associating with the sheriff's office and conducting or participating in its affairs through a

pattern of bribery, and this court upheld that conviction because of Stoller's business relationship with the enterprise. It is clear that if any goal can be attached to an office as an enterprise, the goal of a county sheriff's office is to enforce the law. The activities of Stoller and the other defendants undoubtedly subverted this goal, yet Stoller was associated with the enterprise because he conducted business with it. Moreover, the fact that Stoller had contact with the head of the enterprise is not dispositive: since Stoller need not have had a stake in the enterprise's goals there is no need to scrutinize the individual with whom Stoller had contact in order to determine whether that individual had sufficient power to turn his goals into the goals of the enterprise. Instead,

the important nexus occurs between the defendant and the illegal activities carried on through or by the enterprise.

> "The nature of racketeering connections to an otherwise legitimate business suggests that elements outside a company may assist in obtaining the company's illegal goals. Thus the substantive proscriptions of the RICO statute apply to insiders and outsiders -- those merely 'associated with' an enterprise -- who participate directly and indirectly in the enterprise's affairs through a pattern of racketeering activity. [Citations omitted.] Thus, the RICO net is woven tightly to trap even the smallest fish, those peripherally involved with the enterprise."

Schacht v. Brown, 711 F.2d 1343, 1360 (7th Cir. 1983) (quoting United States v. Starnes, 644 F.2d 673, 679 (7th Cir. 1981)). See also, e.g., United States v. Ambrose, 740 F.2d 505, 512 (7th Cir. 1984); United States v. Kovic, 684 F.2d 512, 516-17 (7th Cir. 1982).

Here, the defendant is clearly alleged to have a business relationship

with the enterprise. The relevant business of the Cook County State's Attorney's Office is to prosecute and otherwise dispose of criminal cases; Yonan's business as an attorney was to negotiate with, oppose, or otherwise deal with that office in representing criminal defendants. This alleged relationship is sufficient for the court to find that Yonan was associated with the State's Attorney's Office for purposes of section 1962(c). Moreover, the seven alleged acts of bribery clearly are sufficient to charge Yonan with conducting or participating in the conduct of that office's affairs through a pattern of racketeering activity. We hold therefore that this count was not legally infirm, and we reverse the district court's dismissal of the count.

AFFIRMED in part and REVERSED in part.

A true Copy:

Teste:

_____
Clerk of the United
States Court of Appeals
for the Seventh Circuit

APPENDIX D

UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604

October 1, 1986

Before
HON. WALTER J. CUMMINGS, Chief Judge
HON. JOEL M. FLAUM, Circuit Judge
HON. FRANK H. EASTERBROOK, Circuit Judge

UNITED STATES OF AMERICA, Plaintiff-Appellant,	) Appeal from) the United) States District
No. 86-1005 vs.	) Court for the) Northern District
CYRUS YONAN, Defendant-Appellee.	) of Illinois,) Eastern Division,)
	) No. 84 CR 246) Milton I. Shadur,) Judge

ORDER

On consideration of the petition for rehearing and suggestion for rehearing en banc filed in the above-entitled cause by defendant-appellee, no judge in active service has requested a vote

thereon, and all of the judges on the original panel having voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

APPENDIX E

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA	)	
	)	No. 84 CR 246
	)	VIOLATIONS: Title
v.	)	18, United States
	)	Code, Sections 1341,
CYRUS YONAN, JR.	)	1962(a) and (c)

The SPECIAL OCTOBER 1983 GRAND JURY charges:

1. At all times material to this Indictment:

a. Defendant CYRUS YONAN, JR. was an attorney and a member of the bar of the State of Illinois.

2. At all times material to this Indictment:

a. The Circuit Court of Cook County was an entity, located in Chicago and elsewhere within Cook County, empowered under the Constitution and laws of the State of Illinois to adjudicate

civil and criminal cases arising in Cook County.

b. Branch 57 of the Circuit Court of Cook County was located at 2650 South California Avenue, Chicago, Illinois and cases involving narcotics charges arising in the City of Chicago were assigned to that Branch for hearings on motions, trials, and dispositions.

3. At all times material to this Indictment:

a. The Office of the Cook County State's Attorney represented the People of the State of Illinois in matters arising in Branch 57 and was empowered under the laws of the State of Illinois to prosecute criminal cases in the Circuit Court. Terrence Hake was an Assistant State's Attorney assigned to Branch 57.

b. The Office of the Cook County State's Attorney was an "enterprise" as that term is defined in Title 18, United

States Code, Section 1961(4), which engaged in and the activities of which affected interstate commerce.

4. At all times material to this Indictment, there were in force and effect criminal statutes of the State of Illinois involving bribery, namely, Illinois Revised Statutes, Chapter 38, Section 33-1, the violation of which was punishable by imprisonment for more than one year. The statute, in pertinent part, states as follows:

> Section 33-1
>
> A person commits bribery when:
>
> (a) With intent to influence the performance of any act related to the employment or function of any public officer, public employee, juror or witness, he promises or tenders to that person any property or personal advantage which he is not authorized by law to accept; or
>
> (b) With intent to influence the performance of any act related to the employment or function of any public officer, public employee, juror or witness, he promises or tenders to one

whom he believes to be a pubic officer, public employee, juror or witness, any property or personal advantage which a public officer, public employee, juror, or witness would not be authorized by law to accept; or

(c) With intent to cause any person to influence the performance of any act related to the employment or function of any public officer, public employee, juror or witness, he promises or tenders to that person any property or personal advantage which he is not authorized by law to accept; or

(d) He received, retains or agrees to accept any property or personal advantage which he is not authorized by law to accept knowing that such property or personal advantage was promised or tendered with intent to cause him to influence the performance of any act related to the employment or function of any public officer, public employee, juror or witness; or

(e) He solicits any property or personal advantage which he is not authorized by law to accept pursuant to an understanding that he shall influence the performance of any act related to the employment or function of any public officer, public employee, juror or witness.

5. Beginning at least as early as September, 1980, and continuing at least through December, 1980, at Chicago, in the Northern District of Illinois, Eastern Division,

CYRUS YONAN, JR.,

defendant herein, being a person associated with an enterprise which affected interstate commerce, namely the Office of the Cook County State's Attorney, did knowingly conduct and participate in the conduct of the affairs of the enterprise, directly and indirectly, through a pattern of racketeering activity, as that term is defined in Title 18, United States Code, Section 1961(5), said pattern of racketeering consisting of the following multiple acts of bribery in violation of Illinois Revised Statutes, Chapter 38, Section 33-1.

(1) On or about September 22, 1980, defendant CYRUS YONAN, JR. gave $100 to James Costello to give to Terrence Hake to influence the handling and disposition of People v. Constance Warr.

(2) On or about October 14, 1980, defendant CYRUS YONAN, JR. gave $300 to Terrence Hake to influence the handling and disposition of People v. Willie Balls, People v. Constance Warr, and People v. John Gilbert.

(3) On or about November 7, 1980, defendant CYRUS YONAN, JR. gave $50 to Terrence Hake to influence the release of a car seized in connection with the arrest of Roosevelt Mitchell.

(4) On or about November 10, 1980, defendant CYRUS YONAN, JR. gave $100 to Terrence Hake to influence the handling and disposition of People v. Willie Booker.

(5) On or about November 13, 1980, defendant CYRUS YONAN, JR. gave $100 to Terrence Hake to influence the handling and disposition of People v. Henry Talbert.

(6) On or about November 26, 1980, defendant CYRUS YONAN, JR. gave Terrence Hake $100 to influence the handling and disposition of People v. James Jones, People v. Thomas McCreary, and People v. Willie Blue.

(7) On or about December 1, 1980, defendant CYRUS YONAN, JR. offered money to Terrence Hake to influence the handling and disposition of People v. Alan Wyman.

All in violation of Title 18, United States Code, Section 1962(c).

(2)

Supreme Court, U.S.
FILED
DEC 23 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-906

In the Supreme Court of the United States

OCTOBER TERM, 1986

CYRUS YONAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

4pp

In the Supreme Court of the United States

OCTOBER TERM, 1986

CYRUS YONAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the court of appeals erred in reversing the dismissal of one count of a multi-count indictment because it failed to state a federal offense.

On March 21, 1984, petitioner was indicted by a grand jury in the United States District Court for the Northern District of Illinois. He was charged with operating the affairs of his law practice through a pattern of racketeering activity by bribing an Assistant State's Attorney to influence the disposition of criminal cases, in violation of 18 U.S.C. 1962(c). On July 17, 1985, petitioner was charged in a superseding indictment that added eight counts of mail fraud, in violation of 18 U.S.C. 1341, and one count of receiving income derived from a pattern of racketeering activity, in violation of 18 U.S.C. 1962(a).

On November 15, 1985, the district court dismissed the initial racketeering count in part on the ground that petitioner was a sole proprietor, and that a sole proprietor could not be employed by or associated with himself. In the meantime, on November 13, 1985, petitioner was charged in another superseding indictment that added the charge that petitioner associated with another enterprise—the State's Attorney's Office—and that he had participated in

its affairs through a pattern of racketeering activity by paying seven bribes to prosecutors, in violation of 18 U.S.C. 1962(c).

On December 2, 1985, the district court dismissed the count alleging the State's Attorney's Office as the racketeering enterprise. The court held that petitioner could not be "associated" with the State's Attorney's Office, because he allegedly had committed crimes against that office. The court also dismissed the sole proprietorship racketeering count for "precisely the same reasons" that it had dismissed that count previously (Pet. App. 1a-22a). On September 2, 1986, the court of appeals reversed the dismissal of the count relating to the State's Attorney's Office and affirmed the dismissal of the sole proprietorship count (*id.* at 1c-19c). The court of appeals held that the relationship between the State's Attorney's business in prosecuting criminal defendants and petitioner's business in representing criminal defendants was sufficient for petitioner to be associated with the State's Attorney's Office for purposes of 18 U.S.C. 1962(c). The court further concluded that the seven alleged acts of bribery were sufficient to charge petitioner with participating in the affairs of the State's Attorney's Office through a pattern of racketeering activity (Pet. App. 11c-18c). The court ruled that the sole proprietorship count was barred on res judicata grounds (*id.* at 9c-11c).

Petitioner contends (Pet. 11-29) that 18 U.S.C. 1962(c) cannot apply to a private attorney's bribe payments to prosecutors, because the private attorney does not become "associated with" the prosecutor's office by paying bribes to its employees. Whatever the merits of petitioner's contentions, they are not presently ripe for review by this Court. The court of appeals' decison places petitioner in precisely the same position he would have occupied if the district court had denied his motion to dismiss. If petitioner is acquitted following a trial on the merits, his con-

tentions will be moot. If, on the other hand, petitioner is convicted and his conviction is affirmed on appeal, he will then be able to present his contentions to this Court, together with any other claims he may have, in a petition for a writ of certiorari seeking review of the final judgment against him. Accordingly, review of the court of appeals' decision would be premature at this time.*

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

DECEMBER 1986

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* Because this case is interlocutory, we are not responding on the merits to the question presented by the petition. We will file a response on the merits if the Court requests.

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